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ABSTRACT

Two bills considered by the 81st General Assembly of the State of Illinois could provide access to collective bargaining for public employees. House Bill 808 provides these rights to employees in public and higher education, and House Bill 1178 requires collective bargaining for police officers in units of local government with populations under one million. The author discusses these bills, as well as legislation in several other states, in the process of determining the elements that should be treated in any law governing collective bargaining for public employees. These elements include the following: specification of the bargaining unit, clarification of rights to organize and strike, definition of negotiable items, and description of impasse resolution procedures. (Author/PGD)

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Elements that Should be Contained in an Omnibus Public Employees' Collective Bargaining Act: Using House Bill 808 and House Bill 1178 - Introduced into the 81st General Assembly of the State of Illinois.

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Two bills, introduced into the 81st General Assembly of the State of ILLINOIS provide access to collective bargaining for public employees. House Bill 808 will provide the right of public and higher employees to organize and bargain collectively, todefine and resolve unfair practice disputes, and to establish the Education Relations Board to administer the act. House Bill 1178 establishes mandatory collective bargaining for police officers in units of local governments of less than 1,000,000 population. It will allow labor organizations exclusively comprised of police officers in negotiation with public employers. This bill would prohibit strikes by police officers. It also authorizes that disputes are to be submitted to a board of arbitration chosen by the parties at issue. Both of these bills would take effect immediately when passed by the legislature. If passed in its present form considerable technical problems would be encountered. Perhaps the greatest obstacle would be the cost of administering. There is no indication of a budget to administer the provisions outlined. Any increase in state spending must first be approved. A more detailed analysis of what should be in a collective bargaining bill for public employees will be presented in this paper,as well recommendations for specific additions to these bills.

Education is a unique enterprise. Much of its success depends upon the close relationship between the teacher, the principal, the administrator, and the children. Some authorities believe that in order to maintain this relationship all segments of the professional staff should belong to the same organization, and that the vast majority of negotiable items pertain to all personnel. Therefore there should not be a conflict of interest in an all-inclusive organization. This is one of the elements that should be contained in an omnibus public employees' collective bargaining act - unit representation. Other essentials are: the right to organize; exclusive representation by a majority vote; the right to bargain in good faith; wages, hours, terms and conditions of employment; and when and how to settle disputes and the issues of strikes.

Several decades ago there was relatively little concern about teachers' strikes. Any action on the part of the teachers to deprive children of education was considered illegal and unprofessional. Recently the attitudes of teachers have changed. Even state legislatures are beginning to change by the fact that the limited right to strike has been granted in Hawaii, Alaska, Oregon, Pennsylvania, Vermont and Wisconsin.

One measure of the need for legislation on collective bargaining is indicated by the fact that seven states - California, Illinois, Michigan, Ohio, New Jersey and Pennsylvania - accounted for nearly 70% of all strikes from 1960-1970. Illinois ranked third in total strikes for the decade of the states that do not have negotiation statutes covering public school teachers.

Since the Executive Order 10988 was issued in 1962, the right to organize and to negotiate, without the right to strike, left the employees in a position where they had no real power under the law.(Andree,1970,31) Law is usually considered to be an aspect of government. But it does not follow that the government is always under the law. One function of the government is to regulate individuals regarding one another. Regulation is in the interest of the group(Punke,1971,5) It is thus, presumed to reflect justice, according to life within the group. In deciding cases, under particular statutes, courts often state their first task is to decide the intent of the bill-- what it was intended to accomplish. That is why the statement of intent or declaration of policy is so important. Another function of government is that of initator. Police protection, postal service, and public education are examples of the government in this role. The status of teachers, police, and other public officials and employees will be substantially affected by the attitudes which their organization take regarding the role of the government. (Punke,1971)

The legislature, when considering legislation, for collective bargaining rights for the public sector should consider who shall be covered; what is negotiable; how shall impasses be solved; what organizational structure is necessary to administer the law.

The problem of coverage is not as simple as it sounds. The choice is between one statute for public school employees or one for all governmental employees, including teachers. When there is general coverage, teachers are covered along with other groups of public employees. The statute may, when it covers all government employees, conflict with existing civil rights or service legislation. This should be checked.

Should there be permissive or mandatory coverage? The union type laws tend to be mandatory, while those applying only to certified personnel, tend to be permissive. Logic seems to be on the side requiring the governmental body to meet and confer with employees in order to reach an agreement. There seems little use of a law which gives the right to bargain without the power to bargain. A permissive law gives the right, but only at the discretion of the board. In order to be truly equal, teachers must have the right to force the board to bargain. The law should indicate whether there should be formal or exclusive recognition; whether the state board or some other body should determine the conditions of representation; who should hold elections and what bargainable items are permitted . Formal representation means that the board recognizes the organization, but that the organization can only speak for itself-- its own members, not for all the employees in the district. On the other hand, exclusive representation means that the organization which has been certified by the board is recognized as representing all the employees in the district, whether they belong to the organization or not.

The method of determining the representation unit varies widely. In some states, the county or local board of education makes the determination; in others it is done by the labor board. Some states do not specify how unit determination is made. One question which may cause problems is what is an appropriate bargaining unit? The trend is toward having separate units for administrators and teachers. Some state laws do not make this aspect clear. Some of the laws specifically exclude the superintendent and any representatives of the board in the bargaining process. There is a wide diversity and no one plan predominates. The union view, of course, is that the same union should not represent both the workers and the management at the same time.

What should be the limits of bargainable issues? The most complex issue in bargaining is that of limitation on the scope. The usual definition is "wages, hours, and conditions of employment." It is this last phrase which causes problems. One side says that it should be construed very narrowly, that a great many matters of school policy should be left as management prerogatives of the school board and be kept off the bargaining table. The other side argues there should be no limit to bargaining; any issue involved in the running of the school is of interest to the teacher and should be part of the collective bargaining act. The bill should provide clear boundaries and guidance. However, leaving the matter ill-defined will result in having a broad coverage. States have passed both types.

The experience has been, in states which have passed a collective bargaining bill, that a number of school districts began collective bargaining without any preparation. This resulted in a large number of strikes, which might have been avoided if there had been adequate training sessions for the teachers. Thus it is important that there is provision in the bill for this preparation for collective bargaining, before it becomes effective as law.

Which type of legislation is best? Where the legislation intent is vague, it may be because the ones that drafted the bill felt that some kind of regulation was needed but did not have enough knowledge to be precise. Sometimes they want to pass the burden of deciding to the courts. Another reason may be that they are inexperienced, doing a poor job of legislative drafting. At the other extreme is one of excessive detail.

Impasse Procedures:

The concept of impasse has application at two distinct points in the bargaining process. When negotiating new terms of agreement or a grievance dispute, the parties may employ self-help or the services of an impartial third party to overcome the deadlocked positions.

In any negotiating situation, there is always a possibility that an impasse will occur. When the concerned parties cannot reach an agreement satisfactory to both, then an impasse exists. The best way to deal with an impasse, is for both parties to bargain in good faith; since we know that this doesn't always happen, there has been provided in HB 808 methods for dealing with this situation.

One method is mediation. Mediation is a process set in motion when both parties involved in an impasse, bring in a third person who will review the problem. There can be no mediation unless the parties jointly agree on the selection of the mediator, the scope of his authority, requirements as to his background, and the sharing of the expenses. For that reason it may be desirable to authorize the agency administering the law to initiate mediation on its own motion. When the state has an existing mediation agency, staffed with skilled mediators that is used for the private sector, it could be economical to consider using them, according to some authorities.

Another method is fact finding. This is not a substitute for mediation. In both of these procedures, the regulatory agency should be kept informed of the progress. The neutral agency may have sole discretion to appoint factfinders or allow the parties to participate in the appointment. The advisory recommendation of the fact-finder must be acceptable to both parties. Therefore it would seem advisable for both to help in the selection. The factfinder should have power to schedule and adjourn hearings; to place witnesses under oath; and to have the power to issue subpoenas for witnesses,books,documents and other evidence. There should be a method for enforcing the above. The cost of factfinding is usually shared by the parties on the premise that the process may be abused, if the cost is borne by the public. This may reduce the temptation to leave the dispute to fact finders rather than pursue the matter through bargaining.

Many authorities agree that compulsory arbitration should not be available if factfinding fails. However, compulsory arbitration is a third method of resolving disputes with the help of outsiders. The parties are bound by the award of the arbitrator. Provision is made to submit disputes, that cannot be resolved through collective bargaining, to binding arbitration in HB 1178. The distinction is that there will be no freedom to decide. This would probably require labor courts for public employment disputes, especially for the police.

Supporters of this bill may argue that only the intent of such legislation can be assessed; that collective bargaining would be enhanced, since failure to agree would expose the parties to the uncertainties of an imposed agreement from which recourse is impossible. The primary purpose is the avoidance of strikes. Disputes would then be settled in the courts.

It is important that the public does not become the innocent victim of a failure of bargaining. However, in court, a judge often has considerable leeway as to the conclusion reached. So it follows that the background of the judge is important. There is a myth to the effect that judges are always objective and unbiased. Like other people, they posses biological and psychological characteristics and they develop vested interests. Sometimes the decision may be reached subconsciously. Some consider the judge to be the pivotal factor among sources of law. His early background, personal habits, professional training, diligence or laziness as related to following rules or precedents, his relations with others, socio-economic status -- all have a bearing when he makes his decision. Lincoln once said that there is no law that does not work injustice in some cases.

In compulsory arbitration, one offer must be accepted, without modification. One must be rejected. The position of the arbitrator appears to be more difficult under this form. To some extent, his continued success and utilization in an arbitration role depends upon the extent to which both parties believe that he is fair and reasonable. Each decision, since it requires him to choose one side or the other, renders him suspect as a neutral in future disputes. Thus, a pattern of choices might be necessary if his own self-interest in uppermost in his mind.

Since the arbitrator is neither elected nor appointed to public office, he should not have the authority to substitute his judgment for that of a government official, because the people's government has sovereign powers. Unions generally want both arbitration and the right to strike as in HB 808.

In settling impasse, third parties are playing an important part. Issues submitted to third parties for recommendations cover a variety of educational policy. If his recommendations are accepted, the practical result is that the third party has determined policy. Therefore, the qualifications of the third party become important. What educational, occupational, and experiential backgrounds are most helpful in resolving educational disputes? Should third parties be experienced in personnel administration and public education? Should the same ones that hear the disputes between the teachers and the school board be the same ones that hear the disputes between a municipality and its police force? Should educational agencies be involved in the selection and assignments of these third parties? Connecticut has a separate statute for teachers that involves the state commissioner of education in certain phases of intervention; but New York and New Jersey exclude educational administration. (seaman, 1970) I would recommend that educators and educational agencies should be involved

in determining the qualifications of the third party as well as in their selection and assignments in negotiation disputes.

The Strike:

The right to strike has been recognized as an important employee prerogative in the free collective bargaining process. In the public sector it has been found to be unlawful conduct because it prevents the government from discharging its obligations to provide public services without interruption. it also deprives the public of protection and the right to public services. Legislatures have often established severe penalties for violation of the no-strike law. New York is one example of imposing severe penalties for striking. (Cresswell, 1976, 65)

The teachers' strike is more than just the refusal of several teachers to perform their duties because of impasse. It constitutes the stoppage of work by an entire group. The dictionary (Black) defines "strike" as "the act of quitting by a body of workman for the purpose of coercing their employer to accede to some demand they have made upon him and he has refused. A combination to obtain higher wages, shorter hours of employment, better working conditions or some concession from employer for the employees; stopping work at a preconcerted time. It involves a combination of individuals, not a single individual." The determinant in ruling upon the legality of the strike is usually the deprivation effect it has on the educational opportunity for the pupils. (Punke, 1971, 33)

Right to Strike

The legal right for teachers to strike was an unanswered question for a long time. "The right of freedom of the press and speech is not an absolute or unqualified right... it is subject to reasonable restriction in the exercise of the police power and is limited by the rights of others." quoted by the court 10 Ohio (2d) 541 Section 468) as a result of a work stoppage by the teachers. Teaching is considered a government function. Thus the use of the injunction, forbidding the strike, has been uniformly upheld on various grounds-- public policy, interference with government function, illegal discrimmination against the right of any citizen to apply for government employment (where the union sought is closed shop) However, in some states, the ultimate weapon of labor--the strike- has been given to some public employees, the limited right to strike. This means that all other means of resolving an impasse has been used to no avail. In some cases, either party could charge the other failing to bargain in good faith and thus institute a strike.

After going months without contracts, teachers have often felt compelled to use whatever means at their disposal to bring pressure to settle contracts. If this bill is passed , the strike would become legal, and teachers would not then be considered "law breakers" or subject to disciplinary action. The teacher as a member of a hierarchy is subject to rules and regulations instituted by the school administration -- yet the teacher is a professional with responsibility and a large grant of discretion in the education of the youth. As an employee, the teacher is subject to authority; in the classroom he is the authority. So when teachers go on strike, in the absence of a permissive law, the students see him as "law breakers."

Third party intervention is provided by the bill. However, nothing says they must follow the fact finder's recommendations. The fact finder is allowed to mediate in an attempt to get a settlement. The award of the arbitrator is binding--this may present an obstacle in getting them to arbitrate. In regards to setting a date for the fact finders, availability of factfinders may influence this portion of the bill, as not much time is allowed for them to hear both sides. Payment for the fact finders might be better if it were shared.

This bill seems to need an extensive budget, but there is no indication of a budget in the bill. Time seems to be an important factor--"90 days prior to the scheduled start of the forthcoming school year--seems to be an advantage for the employer, especially if it means meeting during the teachers' vacation time. Budgets are usually passed in May, so this could become an important factor in settling salaries.

HB 1178 only gives the police permission to bargain and to binding arbitration. HB 808 allows the teachers mediation, factfinding, arbitration and strike. However, all of these mechanisms operate in Illinois to some extent now, without a specific law. These bills would provide specific requirements and sequence for proceeding with impasse. In the private sector, binding arbitration has been accepted by the United Steel Workers, as an alternative to the strike.

The use of the antistrike injunction is inherently adversarial and coercive. This is a very potent weapon for management. So management will support this bill. By the same analysis, the employee should try to prevent its inclusion. On the other hand an injunction may be needed sometimes. It would be needed when a strike would pose a threat to the public welfare. Some courts rule that teachers' strikes do not ordinarily pose such threats and thus would not warrant using the injunction. But if such a threat were to exist, the weight of public

opinion would bring the teachers into compliance. These situations would be rare, but it would be wise to keep this in the bill. Binding arbitration could be considered a violation of the authority of the school board. There is no specific description as to the "qualified third party" but the choice is not restricted, as "nothing prohibits the utilization of other organizations." (HB 808, Line 490)

It seems clear that a pattern borrowed from the private sector does not take into account the unique characteristics of education. Kheele, referring to the Taylor Law (New York) says it does not work because it contains "unilateral determination," but others maintain that the Taylor law does provide for joint determination. However, HB1178 and HB808 do provide for joint determination.

Summary

This law may become a "magna carta" for the teachers and the police, because it has provided guidelines which will lead to improvement in the bargaining process. Of course all of these mechanisms operate in Illinois, to one extent or another, without a new law. We may see an expansion of collective bargaining if this bill is passed. Other states, when such a law is passed, experience a large number of strikes and serious conflicts, because they are unprepared. To avoid this, lead time should be allowed for training.

There may be some real problems because of the failure to clearly define the "terms and conditions of employment." There may be conflicts between other laws that should be considered. Perhaps the community should have been involved more in the decision making, since they pay the taxes.

This bill will give the police and teachers hope that at the end of the road there will be an unbiased, impartial, just court of last appear. The state will place in the hands of the teachers a powerful weapon. It could be used to strike back or it could be used for the betterment of education for all.

Evidence seems to be mounting which may cause many to question the advisability of permitting teachers to negotiate at all. Lieberman withdrew his approval for collective bargaining for teachers in "Eggs I Have Laid" and in his recent book Bargaining. Peter Hennessy in his book, Schools in Jeopardy, appears to agree with him. Hennessy describes the effects of Bill 100 in Ontario. He advocates that bargaining wastes time, energy, and money as well as contributes to the falling morale of the teachers. He advocates that the government should create politically independent provincial machinery for the determination of teachers' salaries and fringe benefits. Standing committees of the board should include parents and students. He wants to replace conflict, uncertainty and alienation with understanding and cooperation.

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